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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

JESSICA AMGWERD, Plaintiff and Appellant, v. DEPARTMENT OF JUSTICE, Defendant and Respondent.	C084868 (Super. Ct. No. 34201400161305CUOEGDS)

In this employment discrimination and retaliation case, plaintiff Jessica Amgwerd appeals after a jury found in favor of defendant the Department of Justice (the Department). Specifically, the jury found Amgwerd did not suffer from a mental disability that limited her ability to work. Amgwerd attacks several of the trial court's discovery and evidentiary rulings as well as the trial court's dismissal of a codefendant long before Amgwerd's case went to trial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

I

Amgwerd's Allegations

Amgwerd, an attorney with the Department, alleged she suffered from anxiety and depression, which interfered with her ability to perform her job duties. "After [Amgwerd] developed anxiety and depression, [the Department] discriminated and harassed [her] on account of [those] disabilities and in response to the fact that she requested reasonable accommodations and took medical leave."

Specifically, Amgwerd alleged her supervisor, Gail Heppell, subjected her to repeated acts of discrimination upon Amgwerd's transfer to the Department's Sacramento health quality enforcement section (the section) in 2008. Amgwerd alleged Heppell was already well known for creating intolerable working conditions, forcing several attorneys to leave the section before Amgwerd's transfer. Similarly, during Amgwerd's tenure, between 2008 and 2013, Heppell continued to create an intolerable working environment by defaming and demeaning her employees, as well as making false accusations of professional misconduct. Heppell's behavior extended to Amgwerd, who she undermined and sabotaged. Heppell assigned Amgwerd large caseloads, which frequently included underinvestigated cases. The large caseloads forced Amgwerd to work significantly more hours than other attorneys.

Starting in 2009, Amgwerd's depression and anxiety worsened because of Heppell's behavior. Amgwerd took multiple days off of work because of stress. She sought counseling through the Department's employee assistance program and through

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1 Amgwerd's appellate claims center around evidence she sought to discover or introduce at trial but was prevented from doing by the court. Given the nature of those claims, the facts as revealed at trial are largely irrelevant. Instead, we focus on Amgwerd's allegations and the legal theories she pursued to introduce evidence that would prove those allegations.

an independent therapist, and she took a month of medical leave between April 7, 2010, and May 2, 2010. Heppell's treatment caused Amgwerd to suffer from back pain, anxiety, insomnia, mood swings, and panic attacks.

In 2009, Amgwerd complained to Heppell's superiors and the Department's employee assistance program about Heppell's conduct. Amgwerd was interviewed by an equal employment rights and resolution officer with the Department, during which she further complained of Heppell's conduct. This angered Heppell and she retaliated against Amgwerd by increasing her scrutiny of Amgwerd's work and assigning Amgwerd a large caseload, which Amgwerd again complained about to the Department. The Department failed to respond to Amgwerd's repeated complaints and denied all of her requests to transfer out of the section.

"In June 2011, when [Amgwerd] requested a reduced schedule [per doctor's advice] due to her health, . . . Heppell belittled [Amgwerd's] work and asked [Amgwerd] to provide her with a doctor's note [to verify] that [Amgwerd] was unable to do her job." In July, Amgwerd gave the Department verification from her treating physician that she could not work more than 40 hours a week. The Department ignored her requested accommodation.

Then, in August, Heppell loudly stated she left reasonable accommodation forms on Amgwerd's desk, which was overheard by Amgwerd's colleague. Amgwerd complained to Heppell's superior again about Heppell's behavior, leading to Heppell's continued retaliation against Amgwerd which included increased verbal abuse and false accusations Heppell communicated to Amgwerd's colleagues. Amgwerd again requested transfer to another section but it was denied. Later that month, Amgwerd's treating physician provided her with documentation supporting her transfer request as a reasonable accommodation.

Amgwerd began a month of stress leave in October 2011 per the advice of her physician. During and after that time, Heppell made disparaging remarks to Amgwerd's

colleagues both within and outside the Department on the basis of Amgwerd's disability. After Amgwerd returned from stress leave in November 2011, Amgwerd filed a workers' compensation claim. Heppell's bullying and sabotaging of Amgwerd continued, as did Amgwerd's large caseload, which was left unattended in her absence. Amgwerd could not manage this caseload, causing Heppell to discipline Amgwerd for not meeting her work demands, despite having just returned from leave. Amgwerd again complained of Heppell's behavior to Heppell's supervisors and Heppell again retaliated against Amgwerd by filing a false corrective action memorandum.

In February 2012, Amgwerd provided verification from a psychiatrist that she should not work more than 40 hours a week or under Heppell's supervision. Amgwerd also filed an equal employment rights and resolutions complaint with the Department against Heppell. In the beginning of March, Heppell filed an adverse action against Amgwerd. Following that adverse action, the Department denied Amgwerd's equal employment rights and resolutions complaint, which Amgwerd believed to constitute "further retaliation, failure to accommodate, and failure to engage in the interactive process in good faith."

Near the end of March 2012, Amgwerd began stress leave. During Amgwerd's leave, she was examined by Dr. Mohan Nair as part of her workers' compensation action. Dr. Nair concluded Amgwerd "was extremely depressed." The day after Dr. Nair's examination of Amgwerd, Amgwerd's treating psychiatrist, Dr. Diane Wolfe, provided Amgwerd with a doctor's note stating she was " 'unable indefinitely to work under the supervision of . . . Heppell.' " Heppell disclosed this confidential medical information to Amgwerd's colleague and disparaged her on the basis of her disability to that same colleague. In April and May 2012, Amgwerd continued making requests for transfers to another section or supervisor. Those requests were all denied without the Department considering alternatives. The section's San Diego office interviewed, but did not hire, Amgwerd. During the interview, Amgwerd was questioned extensively about her prior

lawsuits against the Department and the corrective action memoranda Heppell caused to be placed in her personnel file.

In January 2013, Amgwerd returned to work on a trial basis but Heppell's abusive behavior continued. Amgwerd resigned from her position a little over a week after returning.

II

Legal Proceedings

Amgwerd sued both the Department and Heppell for a variety of employment and privacy causes of action. On January 23, 2015, the trial court sustained Heppell's demurrer to all causes of action against her, including four privacy causes of action, and issued a judgment dismissing Heppell from the case on March 12, 2015. Amgwerd filed the operative complaint on February 13, 2015, naming only the Department as the defendant. Her causes of action included allegations of harassment and discrimination on the basis of her disability and her marital status, as well as for taking medical leave. The causes of action further included allegations of retaliation for opposing employment discrimination and generally that the Department failed to take reasonable steps to prevent the discrimination, harassment, and retaliation alleged.

During discovery, the parties stipulated to the appointment of a referee. The referee ruled on Amgwerd's request for the Department to produce several investigative reports -- the Mersten report, the Vanderveen report, and the Wyckoff/Jones report.[2]

The Mersten report was the product of an independent investigation by the Department into Amgwerd's prelitigation complaints of discrimination and retaliation. It was compiled by Christine Mersten, an attorney from the employment and administrative mandate section of the Department, which provides legal representation to the

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[2] While Amgwerd assigns error to the court's failure to disclose the Swanson report, the court made no ruling as to that report.

Department as well as other state agencies in personnel-related matters. In this case, Mersten represented the civil law division of the Department. The Mersten report was designed to answer a variety of factual and legal questions, including whether Amgwerd was discriminated against or harassed because of her disability or medical condition, and whether Heppell denied Amgwerd a reasonable accommodation or failed to engage in the interactive process. The referee found the report was protected by the attorney-client privilege because "[p]re-litigation investigation[s] performed by outside counsel [are] protected . . . when [the] dominant purpose of the investigation is to provide legal services to the [client] in anticipation of litigation." Amgwerd objected to the referee's recommendation, arguing the dominant purpose of the report was to resolve an internal discrimination complaint and not for anticipated litigation.

The Wyckoff/Jones report was a "statewide review of the Health Quality Enforcement section. It [wa]s not an investigation of . . . Amgwerd[,] although she was interviewed." The referee denied Amgwerd's discovery request as to the Wyckoff/Jones report because it was "covered by [the] deliberative process privilege as well as attorney[-]client privilege." Amgwerd objected to the referee's recommendation arguing the report did not concern government policy for the purposes of the deliberative process privilege nor was it prepared in anticipation of litigation for purposes of the attorney-client privilege.

The Vanderveen report was an investigation into complaints made by a medical board investigator about the section and Heppell. Amgwerd was interviewed for this report. The referee found the interest of justice outweighed the Department's interest in preserving the confidentiality of the report. The referee, however, allowed the Department to redact portions of the report that violated privacy interests of its employees and to then list those redactions in a privilege log. Amgwerd did not object to the referee's recommendation and no issues appear to have arisen from the Department's privilege log. The trial court adopted the referee's recommendations in full.

At trial, Amgwerd pursued five causes of action, including failure to accommodate a disability and failure to engage in the interactive process under the California Fair Employment and Housing Act.[3] Before opening statements, the court made several evidentiary rulings, including to exclude evidence that Amgwerd filed a workers' compensation action against the Department. The court found Evidence Code[4] section 352 barred the parties from referring to the action itself because it was still pending and its characterization as a workers' compensation claim added nothing to the jury's analysis of the issues. The parties could, however, refer to the fact that an investigation occurred and the particulars of what was discovered during the course of that investigation.

During the testimony of Dr. Wolfe, Amgwerd's psychiatrist, the court modified this ruling. On direct examination, Dr. Wolfe testified Amgwerd suffered from an adjustment disorder with high anxiety and moderate to severe depression. Having an adjustment disorder meant Amgwerd experienced a life stressor that resulted in anxiety and depression, which caused significant distress or impacted her personal or professional life. Given Amgwerd's comments during treatment, Dr. Wolfe believed the life stressor to be Heppell. Dr. Wolfe testified about Amgwerd's physical complaints, as well as Amgwerd's complaints about Heppell as portrayed in her treatment notes.

In addition to this evidence, Amgwerd's counsel questioned Dr. Wolfe about a letter she wrote in May 2012 in response to Dr. Nair's evaluation of Amgwerd during the workers' compensation process. The letter included excerpts from Dr. Nair's report and Dr. Wolfe's agreement or disagreement with Dr. Nair's assessments. Dr. Wolfe agreed with Dr. Nair's assessment that Amgwerd's disability of depression and anxiety was

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3 Government Code section 12900 et seq.

4 Further section references are to the Evidence Code, unless indicated otherwise.

caused by "her cumulative injury at work from 2004 [to] 2012" "within a reasonable medical probability." Dr. Wolfe disagreed with Dr. Nair's assessment that Amgwerd did not currently suffer from a disability. Dr. Wolfe supported her agreement and disagreement with her observations of Amgwerd during her multiple treatment sessions as described in her treatment notes. After a sidebar, the court excluded the letter, and at a recess, the court explained it did so under section 352. The court reasoned that because Dr. Nair was not expected to testify to contextualize his statements and Dr. Wolfe's contribution to the letter was a restatement of her testimony, the jury would likely be confused by the letter and the matters discussed in it.

During its pretrial rulings, the court also excluded the testimony of several of Amgwerd's coworkers who disliked Heppell's supervision, unless their problems with Heppell were the result of Heppell's discriminatory treatment of them. At the time of its ruling, the court indicated Amgwerd could introduce this evidence in the event a witness testified that Heppell was a successful supervisor. The court further excluded, under section 352, the testimony of several of Amgwerd's former colleagues and supervisors concerning her skills as an attorney because the proffered testimony concerned Amgwerd's abilities before Heppell became her supervisor.

Following Dr. Wolfe's testimony, the Department's expert in forensic psychiatry, Dr. Mike Levy, testified. As a forensic psychiatrist, Dr. Levy's job was to discover what was objectively true and, as it related to this case, to answer four specific questions. These questions were: 1) Did Amgwerd have a psychiatric disorder? 2) If so, what relationship, if any, did the disorder have to the employment issues in dispute? 3) Were there other factors contributing to Amgwerd's psychiatric disorder? 4) Assuming Amgwerd's disorder was caused or exacerbated by the Department, what was the prognosis and recommended treatment? To answer these questions, Dr. Levy performed a six-hour psychiatric examination of Amgwerd. He also reviewed Amgwerd's deposition, as well as Heppell's deposition and several, but not all, of their colleagues'

depositions. Dr. Levy further reviewed the deposition testimony of Amgwerd's doctors, as well as those doctors' medical records regarding Amgwerd and records from other therapies Amgwerd sought. He reviewed legal documents consisting of the operative complaint in this matter, Amgwerd's declaration and exhibits opposing summary judgment in this matter, the order dismissing a 2011 lawsuit Amgwerd brought against the Department, the final judgments in two State Personnel Board cases involving Amgwerd, and Amgwerd's employee file from the Department.

Dr. Levy also requested his colleague, Dr. Sarah Hall, a forensic psychologist, to preform psychological tests of Amgwerd and prepare a confidential psychological testing consultation report, which he spoke to Dr. Hall about at length. Amgwerd objected to Dr. Levy's testimony to the extent it was based on Dr. Hall's testing. The court admitted Dr. Levy's testimony, finding Dr. Levy was permitted to testify generally to what he relied on from Dr. Hall's report but he could not testify to the specifics of her findings regarding Amgwerd.

Dr. Levy testified Amgwerd suffered from a personality disorder and a depressive disorder. A personality disorder is an unconscious behavioral trait that functionally impairs interpersonal and work relationships. In Dr. Levy's opinion, Amgwerd's personality disorder included a constant need for validation for her to have self-worth. When she was confronted with a supervisor who did not meet those expectations, she became depressed, anxious, and angry. Dr. Levy believed Amgwerd suffered from a minor persistent depressive disorder, meaning she was capable of functioning but had difficulty taking pleasure in life. Symptoms would typically include feeling sad most days over the course of several months. Dr. Levy acknowledged Amgwerd had been functionally impaired by her depressive symptoms at various times. In Dr. Levy's opinion, Amgwerd's depression did not cause her inability to work. Instead, her personality disorder and conflict with Heppell caused her to suffer depressive symptoms,

but she retained the ability to work as shown by her willingness to work with others aside from Heppell.

On cross-examination, Amgwerd questioned Dr. Levy about a statement he made in his report. Dr. Levy's report was not admitted into evidence. Amgwerd asked whether Dr. Levy wrote in his report "that Amgwerd's symptoms of emotional distress developed as a result of the conflict between Ms. Amgwerd's long-standing, underlying personality disorder and Ms. Heppel[l]'s management style as a successful [Department] litigation supervisor for more than 30 years." Dr. Levy admitted to writing that statement. Amgwerd then questioned Dr. Levy about whether he thought her reaction to Heppell's conduct unique. She queried whether he had an aggregate impression of Heppell's managerial style and the effect that impression had on his expert opinion. Dr. Levy testified he did not consider Heppell's managerial style or Amgwerd's reaction to it when concluding Amgwerd had a personality disorder.

At a recess, the trial court noted Amgwerd attempted to elicit testimony from Dr. Levy that he relied on Heppell's interactions with other employees when forming his opinion that Amgwerd suffered from a personality disorder. Through that questioning, the court believed Amgwerd was trying to seek admission of her colleagues' complaints against Heppell, which was excluded before trial. The court noted that Dr. Levy was adamant in denying he considered Heppell's managerial style when determining whether Amgwerd suffered from a personality disorder.

After the recess, Amgwerd again questioned Dr. Levy about the statement in his report, which assumed Heppell was "a successful [Department] litigation supervisor for more than 30 years." Amgwerd then questioned Dr. Levy about information he did not consider when forming his opinion, including Amgwerd's performance appraisals while at the Department or from her current job. Dr. Levy also did not consider Amgwerd's journals or the deposition testimony of three of Amgwerd's colleagues.

Based on this evidence, as well as the other evidence presented at trial, the jury found Amgwerd did not prove her failure to accommodate and failure to engage in the interactive process claims because she did not prove she had a mental disability that limited her ability to work.[5] Amgwerd filed a notice of appeal on May 30, 2017, following the judgment.

DISCUSSION

I

Amgwerd's Appellate Claim Against Heppell Must Be Dismissed

Amgwerd contends the trial court erred by sustaining Heppell's demurrer and by not providing Amgwerd an opportunity to amend her complaint. The Department counters that Amgwerd's appellate challenge to the court's ruling on the privacy causes of action against Heppell is untimely. Specifically, the Department argues that because the effect of the court's ruling was to dismiss Heppell from the case entirely, Amgwerd was required to appeal that judgment immediately if she wished to appeal it at all. We agree with the Department.

In a multiparty action, if all issues are resolved as to one party, then the judgment is final as to that party. (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 437.) Indeed, even where a judgment does not dispose of all the claims in an action, the judgment is nonetheless final and appealable to the extent it "leaves no issue to be determined as to

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[5] As to Amgwerd's other claims, the jury also found for the Department. Specifically, it found the Department was not motivated by Amgwerd's medical leave when taking adverse action against her nor did the Department's conduct adversely affect the conditions of Amgwerd's employment. Finally, the jury found the Department never subjected Amgwerd to discrimination during the course of her employment, thus the Department did not fail to prevent discrimination. We go into no further detail of these claims because Amgwerd's appellate evidentiary claims appear to pertain to the jury's finding regarding her disability and not the jury's findings regarding the Department's conduct. Thus, the verdicts to these causes of action would remain unchanged despite a favorable outcome for Amgwerd on appeal.

one party." (*Justus v. Atchison* (1977) 19 Cal.3d 564, 568, overruled on another ground in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171; accord, *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 993, fn. 3 ["an order dismissing fewer than all defendants from an action is a 'final judgment' as to them, and is thus appealable"].) This is because "it better serves the interests of justice to afford prompt appellate review" where one party's "rights or liabilities have been definitively adjudicated than to require [that party and its adversary] to await the final outcome of trial proceedings which are of no concern" to the party whose rights have been fully and finally determined. (*Justus*, at p. 568; see *Rocca v. Steinmetz* (1922) 189 Cal. 426, 428 ["[T]o hold the person bound to wait until the final judgment against the other party before taking an appeal . . . is wholly unreasonable . . . . [S]uch a judgment is final within the meaning of that term . . . . No other judgment can be entered against [her], as [she] will go free if the case goes no further against [her]"].)

Much of the case law on this point is of a different procedural posture than Amgwerd's case. For example in *Justus*, two of four plaintiffs appealed after the defendant successfully demurred to the causes of action brought by those plaintiffs. The court found it had jurisdiction to hear those plaintiffs' appeals despite the fact that an action still existed between the defendant and the two remaining plaintiffs. (*Justus v. Atchison, supra*, 19 Cal.3d at p. 568.) Similarly, in *Hydrotech*, our Supreme Court had jurisdiction despite an ongoing action between the plaintiff and a remaining defendant. (*Hydrotech Systems, Ltd. v. Oasis Waterpark, supra*, 52 Cal.3d at p. 993, fn. 3.) Conversely, Amgwerd did not appeal following dismissal of Heppell from the action, and instead waited until resolution of the entire case. She argues that while this court had jurisdiction to hear the appeal immediately following Heppell's dismissal, we also have jurisdiction to hear it now under the one final judgment rule. Amgwerd points to the permissive language in the case law, arguing it allows for appeal immediately following a party's dismissal but does not mandate it.

The problem with Amgwerd's argument is that an appeal is always the result of a permissive act initiated by an appellant. (See Code Civ. Proc., § 904.1, subd. (a)(1) ["An appeal . . . *may* be taken from any of the following: [¶] (1) From a judgment . . . ."], italics added.) A party could instead accept the judgment of the trial court, ceasing court involvement in the matter. However, if an appealable order exists and the party whose interests were adversely affected wishes to appeal that order, the party must do so within the period required by law or forfeit appellate review altogether. (*In re Baycol Cases I & II* (2011) 51 Cal.5th 751, 762.)

Here, the court entered judgment dismissing Heppell from the action on March 12, 2015. This constituted a final and appealable judgment. (See *Nguyen v. Calhoun*, *supra*, 105 Cal.App.4th at p. 437.) Under California Rules of Court, rule 8.104(a)(1)(A), (B), a notice of appeal under these circumstances "must" be filed within 60 days after service of a notice of entry of judgment or within 180 days after entry of the judgment. Amgwerd filed the notice of appeal on May 30, 2017, far beyond the time permitted. "These time limits are jurisdictional. We are powerless to extend the time to file a notice of appeal, or to hear untimely appeals." (*In re Marriage of Mosley* (2010) 190 Cal.App.4th 1096, 1101.) Because Amgwerd did not file a timely appeal from the final judgment dismissing Heppell from the action, we lack jurisdiction to hear Amgwerd's appellate claims regarding Heppell's dismissal. Accordingly, we must dismiss Amgwerd's appeal in this regard.[6]

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6 In her second argument, Amgwerd contends Heppell's conduct of sharing her psychiatrist's note with another employee and ridiculing her medical condition went "far outside of 'the supervisor's standard oversight of job performance.' " In her third argument, Amgwerd contends that as a matter of law she was entitled to transfer to another supervisor given Heppell's conduct and its effect of causing Amgwerd increased anxiety and depression. Amgwerd fails to frame these arguments as claims of error. She does not appear to challenge the jury's verdicts or a court ruling, and we are left guessing at the purpose of these arguments. Thus, we will not address them. (See *County of*

II

The Court Properly Ruled On Amgwerd's Discovery Requests For Several Reports

Amgwerd takes issue with the trial court's denial of her motion to compel in regard to several requested reports. "We review the trial court's grant or denial of a motion to compel discovery for an abuse of discretion." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 540.) However, "[a]n order that implicitly or explicitly rests on an erroneous reading of the law necessarily is an abuse of discretion." (*Ibid.*) Further, "trial courts issuing discovery orders and appellate courts reviewing those orders should do so with the prodiscovery policies of the statutory scheme firmly in mind. A trial court must be mindful of the Legislature's preference for discovery over trial by surprise, must construe the facts before it liberally in favor of discovery, may not use its discretion to extend the limits on discovery beyond those authorized by the Legislature, and should prefer partial to outright denials of discovery." (*Ibid.*)

A

Mersten Report

Amgwerd contends the court erred by concluding the Mersten report was privileged as an attorney-client communication. We disagree.

"The attorney-client privilege, which is set forth in . . . section 954, confers a privilege on the client 'to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer . . . .' The fundamental purpose of the privilege ' "is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding legal matters." ' [Citation.] The privilege is absolute and precludes disclosure of

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Sacramento v. Lackner (1979) 97 Cal.App.3d 576, 591 [an appellant must "present argument and authority on each point made"]; see also Cal. Rules of Court, rule 8.204(a)(1)(B).)

confidential communications even though they may be highly relevant to a dispute. [Citation.]

"A party that seeks to protect communications from disclosure based upon the attorney-client privilege must establish the preliminary facts necessary to support its exercise -- i.e., a communication made in the course of an attorney-client relationship. [Citation.] 'Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply.' [Citation.]

"An attorney-client relationship exists when the parties satisfy the definitions of 'lawyer' and 'client' as specified in . . . sections 950 and 951, respectively. For purposes of the attorney-client privilege, 'client' is defined in relevant part as 'a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal *service or advice* from him in his professional capacity. . . .' (§ 951.) A 'confidential communication' means 'information transmitted between a client and his or her lawyer in the course of that relationship and in confidence' by confidential means. (§ 952.) A confidential communication may include 'a legal opinion formed and the advice given by the lawyer in the course of that relationship.' [Citation.]

"In assessing whether a communication is privileged, the initial focus of the inquiry is on the 'dominant purpose *of the relationship*' between attorney and client and not on the purpose served by the individual communication. [Citation.] 'If a court determines that communications were made during the course of an attorney-client relationship, the communications, including any reports of factual material, would be privileged, even though the factual material might be discoverable by other means.' " (*City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, 1032.)

Amgwerd begins by arguing there was no attorney-client relationship between Mersten and the Department. Not so. Mersten declared she was an attorney with the Department, and for the purposes of the Mersten report, her client was the civil law division of the Department. While she may have been acting as an investigator, her task was to use the investigation to answer specific factual and legal questions relevant to Amgwerd's allegations of discrimination. At all times, Mersten viewed her relationship with the Department as constituting an attorney-client relationship and relied on over 20 years of legal expertise in employment law when investigating and compiling her report. From this proffer, the Department demonstrated the dominant purpose of the relationship between Mersten and the Department was one of attorney and client and that the Mersten report was compiled as part of that relationship.

Amgwerd argues Mersten was not acting as an attorney, but as an investigator. However, "[t]he rendering of legal advice[, however] is not required for the [attorney-client] privilege to apply. [¶] As the United States Supreme Court has recognized, '[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.' [Citation.] It is for this reason that 'fact-finding which pertains to legal advice counts as "professional legal services." ' " (*City of Petaluma v. Superior Court*, *supra*, 248 Cal.App.4th at p. 1034.) Thus, Amgwerd's argument to the contrary must fail.

Amgwerd further argues Mersten's clients for purposes of the Mersten report were the equal employment rights and resolution office because the report provided her with an avenue to address her complaint without a lawsuit. The problem with Amgwerd's argument is that the equal employment rights and resolution office is part of the Department and the ability to address wrongful conduct internally and without a lawsuit is not only to Amgwerd's benefit but to the Department's as well. Thus, the fact the report was a vehicle to resolve Amgwerd's complaint of discrimination without a lawsuit

does not rebut the Department's showing that an attorney-client relationship existed between Mersten and the Department.

Similarly, Amgwerd's focus on the fact the Mersten report was not prepared for litigation misses the point. "In order for a communication to be privileged, it must be made for the purpose of the legal consultation, rather than some unrelated or ancillary purpose." (*Los Angeles County Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 297.) As Mersten declared, the Mersten report was designed to answer several factual and legal questions regarding Amgwerd's allegations of discrimination and retaliation. The questions included whether discrimination and retaliation occurred within the legal definition of those words. Given that subject matter, we must conclude the communication was a legal consultation, regardless of whether litigation was contemplated.

Finally, Amgwerd cites California Code of Regulations, title 2, section 59.1, for the proposition she is entitled to the the production of the Mersten report. Amgwerd is mistaken. This regulation allows Amgwerd to request the Mersten report during the discovery process of a State Personnel Board Hearing. (Cal. Code. Regs., tit. 2, § 59.1, subd. (c)(5).) The Department is then required to respond to the discovery request within 30 days with any claims of privilege, among other objections, similar to what happened here. (Cal. Code Regs., tit. 2, § 59.1, subd. (d)(1).) Accordingly, the court did not err by denying Amgwerd's request for the Department to produce the Mersten report.

B

Wyckoff/Jones Report

Much like the Mersten report, the Wyckoff/Jones report was prepared by Department attorneys tasked with investigating and answering specific factual and legal questions relevant to the internal administration of Amgwerd's section of the Department. The Wyckoff/Jones report further included "conclusions and recommendations" based on that investigation. This proffer establishes the Wyckoff/Jones report was a

communication made during the attorney-client relationship. Amgwerd attempts to refute this conclusion by arguing the Wyckoff/Jones report was relevant to her claim Heppell created a toxic work environment. Relevance, however, is not the measure of whether a document falls outside the attorney-client privilege. (See *Los Angeles County Board of Supervisors v. Superior Court*, *supra*, 2 Cal.5th at p. 297.) Thus, Amgwerd fails to rebut the Department's showing of privilege and the court did not err by denying Amgwerd's request for the Department to produce the Wyckoff/Jones report.

C

Vanderveen Report

Amgwerd contends the court erred by ruling only the statements she made for the Vanderveen report could be disclosed. She also contends the court erred by excluding from disclosure the other interviews in the report. Amgwerd appears mistaken. The referee compelled disclosure of the Vanderveen report in its entirety, except for portions of the report that violated privacy interests of the Department's employees. Amgwerd did not object to the referee's recommendation in this regard and it does not appear there was any further dispute regarding the Vanderveen report. Thus, the trial court did not err as Amgwerd contends.

D

Swanson Report

Amgwerd contends the trial court erred by failing to compel the Department to produce the Swanson report. The only mention of the Swanson report in the record was in Amgwerd's reply in support of her motion to compel production of documents.[7] She described the Swanson report as "regarding the complaint [she] filed about [the Department's] Licensing Section." The Swanson report was not addressed by the

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[7] Amgwerd's motion to compel production of documents was not included in the appellate record.

referee's recommendations and Amgwerd did not make reference to it in her objections. Amgwerd's purported citations to the Swanson report in her appellate briefing are merely to the operative complaint and the court's exclusion of testimony. Both citations appear to concern Amgwerd's prior allegation of discrimination against the Department, but neither citation refers to a report. Given the lack of context provided by the appellate record and Amgwerd's failure to object to the referee's recommendations, we conclude Amgwerd has forfeited her appellate claim regarding the Swanson report. (See Cal. Rules of Court, rule 8.204(a)(1)(C); *Guthrey v. State of California* (1998) 63 Cal.App.4th 1109, 1115 [an appellant must cite to the record to direct the reviewing court to the pertinent evidence or other matters in the record that demonstrate reversible error].)

III

The Trial Court Did Not Abuse Its Discretion By Limiting Reference To Amgwerd's Pending Workers' Compensation Action Against The Department

Amgwerd contends the trial court erred by excluding, under section 352, all reference to her workers' compensation action against the Department and to Dr. Wolfe's responsive letter to Dr. Nair's opinion Amgwerd's disability was caused by Heppell's treatment of her. She argues the action and Dr. Nair's opinion were relevant to show when the Department knew of Amgwerd's disability and its cause. Amgwerd further argues that, by excluding the evidence, the court precluded her from impeaching witnesses with statements they made during the workers' compensation investigation.

Section 352 allows "[t]he court in its discretion [to] exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. (*People v. Henriquez* (2017) 4 Cal.5th 1, 31.)

Initially, we note Amgwerd's characterization of the court's ruling is mistaken. The court ruled Amgwerd could refer to specifics of the investigation but could not inform the jury the evidence came from a "workers' compensation" investigation. Indeed, the court believed the nature of the investigation was irrelevant and confusing, especially considering the workers' compensation action was pending. Amgwerd does not appear to assign error to this ruling. She does not argue the nature of the investigation was particularly relevant, nor why she was prejudiced by its exclusion. Further, to the extent she argues the court prevented her from impeaching witnesses with their statements from the workers' compensation investigation, she does not point us to any instances where this actually occurred. Thus, to the extent Amgwerd argues the court erred by excluding reference to a prior investigation as a "workers' compensation" investigation, we conclude that claim is without merit.

We further conclude the trial court did not abuse its discretion by excluding Dr. Wolfe's letter responsive to Dr. Nair's opinion as quoted from the workers' compensation investigation. First, Dr. Wolfe's response as articulated in the letter was cumulative to her testimony in that the letter recited Dr. Wolfe's opinion and treatment notes, which she had already testified about. Further, Dr. Nair's opinion, as quoted by Dr. Wolfe, that Heppell's conduct caused Amgwerd's " 'temporary psychiatric disability' " was overwhelmingly confusing. Dr. Nair's opinion as quoted is incomplete and lacks context. It was offered for the purposes of a workers' compensation claim, with different standards and measures of liability than the discrimination and retaliation claims at issue here. Given that Dr. Nair was not called to explain his opinion, the jury was left to guess at the meaning and significance of Amgwerd's cherry-picked statements. The resulting confusion would reasonably cause undue prejudice against the Department, and thus the trial court did not err in excluding Dr. Wolfe's letter responsive to Dr. Nair's opinion.

IV

The Department's Expert

A

Amgwerd Forfeited Her Appellate Contention That Dr. Levy Should Have Been Disqualified Or Impeached

It is difficult to ascertain Amgwerd's appellate argument related to the trial court's motions in limine rulings and the Department's expert witness, Dr. Levy. She appears to contend Dr. Levy should have been disqualified as an expert witness because his opinion did not consider information favorable to her or critical to Heppell. Amgwerd argues the admission of Dr. Levy's testimony was prejudicial because it resulted in testimony he thought Heppell was a successful supervisor for over 30 years. Despite this testimony, she asserts the court further erred by preventing Amgwerd from rebutting Dr. Levy's opinion with evidence from prior coworkers as to Heppell's abilities as a supervisor and as to Amgwerd's ability to work well with prior supervisors.

We note Amgwerd has failed to cite to any authority in this argument, except for *People v. Sanchez* (2016) 63 Cal.4th 665, which is not relevant to this issue. For this reason alone, we conclude the argument is forfeited. (See *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 ["When legal argument with citation to authority is not furnished on a particular point, we may treat the point as forfeited and pass it without consideration"].) However, we point out several factual inaccuracies in Amgwerd's argument that defeat her claim of error as well.

First, Dr. Levy did not consider only information favorable to the Department when forming his opinion. He testified he interviewed Amgwerd for six hours and reviewed the medical records of her treating doctors. He further reviewed psychological testing performed on Amgwerd by a colleague and the deposition testimony of Amgwerd and several coworkers. Amgwerd does not explain how this information failed to provide the proper basis for Dr. Levy's opinion to the point where he should have been

disqualified from testifying. Instead, she points to several items she believes Dr. Levy should have considered when forming his opinion and conclusively states "[t]he biased and limited information Dr. Levy reviewed disqualified him from rendering an expert opinion." These omitted items are relevant to the weight of Dr. Levy's opinion, not to its admissibility. (See *People v. Jones* (2012) 54 Cal.4th 1, 59 ["Once an expert witness establishes knowledge of a subject sufficient to permit his or her opinion to be considered by a jury, the question of the degree of the witness's knowledge goes to the weight of the evidence and not its admissibility"].) Indeed, Amgwerd questioned Dr. Levy about his omissions on cross-examination.

Second, the court's admission of Dr. Levy's testimony did not result in his statement that Heppell was a successful supervisor for over 30 years. In fact, this information was not communicated to the jury during the Department's questioning of Dr. Levy. *It was Amgwerd who asked Dr. Levy about a notation from his report that provided Heppell was a successful supervisor for over 30 years*. It appears she did so, as the trial court noted, to elicit testimony Dr. Levy relied on that fact when forming his opinion Amgwerd suffered from a personality disorder and not a disability. Dr. Levy, during repeated questioning, denied considering the quality of Heppell's supervisory skills when forming his opinion regarding Amgwerd.

Given this state of the record, the court's ruling that Heppell's managerial skills and Amgwerd's relationships with past supervisors and colleagues were irrelevant for purposes of impeaching Dr. Levy's testimony was not made in error. This evidence does not tend to show Amgwerd's depression and anxiety were caused by a disability, as opposed to a personality disorder and her conflict with Heppell. It merely shows other employees had conflicts with Heppell and Amgwerd got along with her past supervisors, issues irrelevant to whether Amgwerd suffered from a disability. Accordingly, the trial court did not err by excluding this evidence for purposes of impeaching Dr. Levy.

B

Dr. Levy Did Not Impermissibly Testify About Dr. Hall's Testing

Amgwerd contends the "trial court's legal conclusion that an expert can render an opinion based on inadmissible hearsay and without providing the proper foundation warrants de novo review." Again, we must make preliminary observations to properly characterize Amgwerd's argument in light of the record. Notably, Amgwerd did not argue as she does on appeal, and the trial court did not rule on, whether Dr. Levy's expert opinion had proper foundational support under *Kelly/Frye*.[8] Thus, that argument is forfeited. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 414 [a party's failure to object to scientific evidence on *Kelly/Frye* grounds in the trial court results in the forfeiture of the argument on appeal that the evidence was improperly admitted without an adequate *Kelly/Frye* foundation].)

Amgwerd's trial argument regarding Dr. Levy's testimony was that he should not testify to Dr. Hall's testing and results, especially when that testimony revealed facts specific to Amgwerd. The court was sympathetic to this argument and the Department did not elicit testimony about Dr. Hall's testing or her results. Indeed, Dr. Levy did not testify about Dr. Hall's testing of Amgwerd, except to state that he relied on her psychological testing when forming his own opinion. Thus, to the extent *Sanchez* applies in civil cases, as Amgwerd argues, Dr. Levy testified in conformity with that decision. (*People v. Sanchez, supra,* 63 Cal.4th at pp. 684-686 [if the fact relied on by an expert is a case-specific fact and the witness has no personal knowledge of it and no hearsay exception applies, the expert simply may not testify about it].)

To the extent Amgwerd argues Dr. Levy could not *rely* on Dr. Hall's testing when forming his opinion, that argument lacks merit. She points to *Sanchez* for support, but

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8 *Frye v. U.S.* (D.C. Cir. 1923) 293 Fed. 1013; *People v. Kelly* (1976) 17 Cal.3d 24.

that case merely states an expert cannot *testify* to case-specific hearsay statements unless someone with personal knowledge first lays the foundation for jury consideration of that hearsay. (*People v. Sanchez*, *supra*, 63 Cal.4th at pp. 684-686.) *Sanchez* did not preclude an expert from *relying* on that same statement when forming his or her opinion. Thus, because Dr. Levy did not testify to the case-specific hearsay produced from Dr. Hall's testing and results, the court did not err by allowing Dr. Levy to testify to his opinion even though it relied on Dr. Hall's testing and results.

DISPOSITION

The appeal is dismissed as to Heppell. The judgment is affirmed. The parties shall bear their own costs. (Cal. Rules of Court, rule 8.278(a)(5).)

/s/
Robie, J.

We concur:

/s/
Raye, P. J.

/s/
Hull, J.